
IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CASH COLE,

Appellant,

VS.

WALLIS GEORGE,

Appellee.

FILED

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APPELLANT'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE

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CASE NO. 10147

IN THE
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CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

APPELLANT'S BRIEF

STATEMENT OF CASE

The question involved in this appeal is whether under Section 923 of the Compiled Laws of Alaska of 1933 as amended by Section 923 of the Session Laws of Alaska of 1935, it is necessary to make a written request upon both the President and the Treasurer of a corporation or whether written request upon only

one, to-wit, the treasurer is sufficient to make that one liable for the amount provided as a penalty, in the amended section referred to?

Section 923, Session Laws of 1935:

The section, as amended reads as follows:

“Every corporation formed under this article, shall annually, within sixty days from the first day of January of each year, file with the Auditor of the Territory of Alaska and with the Clerk of the District Court in each Division wherein business of the corporation is conducted, a report made and verified by the president and the treasurer and shall keep a copy thereof at its main office for inspection of stockholders, which shall state:

1. The amount of its capital stock and the amount actually issued.
2. The amount of its debts.
3. The amount of its assets.
4. The name and addresses of all the directors and officers of the corporation.

Any corporation organized under the provision of this title whose fiscal years ends at any other time than the end of the calendar year, shall be allowed sixty days from the date on which its fiscal year ends within which to file this report.

And if any corporation shall fail to file its annual reports as required in this section, all contracts made by such corporation with the residents

of the Territory of Alaska, made in the Territory shall be voidable as to the corporation during the time it shall neglect to file such report, and no Court in the Territory shall enforce same in favor of the corporation.

If any report be not made and filed as prescribed in this section, either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request to do so shall have been made by a creditor or a stockholder, of the corporation, shall be under penalty of \$50.00 recoverable by such aggrieved creditor or stockholder, for every day he or they shall so neglect or refuse."

SPECIFICATION OF ERROR

Appellant-Petitioner relies upon each of his two specifications of error, namely:

I.

The court erred in sustaining the second point of defendant's (appellee's) demurrer to plaintiff's (appellant's) amended complaint, to-wit, in holding that said amended complaint does not state facts sufficient to constitute a cause of action against defendant (appellee), to which ruling plaintiff (appellant) excepted and which exception was duly allowed.

II.

The court erred in making and entering herein its certain judgment, dated April 9th, 1942, in favor of the Appellee (defendant) and against the Appel-

lant (plaintiff), and in finally dismissing appellant's (plaintiff's) amended complaint, to which ruling appellant (plaintiff) duly excepted and his exception was allowed.

THE FACTS

The plaintiff's amended complaint alleged that the plaintiff is a stockholder and the defendant, Wallis George, is secretary and treasurer of the Baranof Hotel, Inc., an Alaska corporation; that it was the duty of the corporation to file its annual report of its financial condition for the year of 1940 with the Auditor of the Territory and the Clerk of the Court for the First Division; that upon the failure of said corporation to file said report it became the duty of the defendant Wallis George to file said report within ten (10) days after written request to do so had been made upon him by a stockholder; that the plaintiff made such a written request upon the defendant treasurer and secretary of the corporation; that the report of the financial condition of the corporation be filed as aforesaid for the year of 1940; that the defendant refused and neglected to file said report up to the time of filing the complaint in this action to file said report; that by reason of the premises the defendant became indebted to the plaintiff for the penal sum as provided by the statute.

Defendant's demurrer to the amended complaint was sustained by the trial court on the ground that the

amended complaint failed to state facts sufficient to constitute a cause of action; the court held that a written request must be made upon both the treasurer and the president and that the allegation must appear in the complaint that the written request was so made, upon both the president and treasurer.

BASIS OF JURISDICTION

The District Court of the Territory of Alaska had jurisdiction of this case under the provisions of Section 1091, Compiled Laws of Alaska of 1933, and Section 104, Title 28, U. S. C. A.

The Circuit Court of Appeals has jurisdiction in this cause upon appeal, under Sections 4050, 4051, 4052, 4055, 4056, and 4058, Compiled Laws of Alaska of 1933, and by virtue of Section 225, Title 28, U. S. C. A.

The amount in controversy is more than \$6,000.00.

ARGUMENT

The assignments of error are directed to appellant's contention that the trial court's holding that the amended complaint did not state facts sufficient to constitute a cause of action is contrary to law.

The argument in support of this contention falls into three (3) parts, the first of which is . . . Does Section 923 of the Compiled Laws of Alaska of 1933 as

amended by the Session Laws of Alaska of 1935 place the duty on the corporation to file a financial report, made and verified by the president and treasurer, in the first instance, by virtue of paragraph one (1) of said section, or is the duty on the president and treasurer?

Second, If the duty is on the corporation in the first instance then following the corporation's failure to file said report, does the duty devolve upon the president and treasurer jointly, jointly and severally, or severally, after written request to file such report has been made upon either of such officers by a stockholder?

Third, Is it necessary for an aggrieved stockholder to make a written request upon both the president and treasurer of said corporation, in order to subject the one officer who has been requested to perform such duty, to the statutory penalty?

If the duty is on the corporation in the first instance to file said annual report then there is no duty on either the president or treasurer until a written request is made upon either of such officers. If the duty is on the corporation in the first instance, and it devolves upon the president and treasurer severally, or jointly and severally, then it is sufficient to make a written request on either of such officers and the officer upon whom the written request is made is obligated to perform. If the duty devolves upon the

president and treasurer after written request is made upon either of them, it is not necessary to make a written request on both of such officers in order for a stockholder to recover the statutory penalty.

If we are correct in any of the three (3) contentions the amended complaint alleges sufficient facts to constitute a cause of action in this case.

FIRST POINT

Does Section 923 of the Compiled Laws of Alaska of 1933 as amended by Section 923 of the Session Laws of Alaska of 1935 place the duty on the corporation to file an annual financial report, made and verified by the president and treasurer in the first instance, by virtue of paragraph one (1), or is the duty on the president and treasurer from the beginning?

It is appellant's contention that by the statute the duty is placed upon the corporation, to file the annual financial report, made and verified by the president and treasurer. If the corporation files a report which is not made and verified by both the president and treasurer it would not be sufficient and the corporation would fail to comply with the statute.

The statute in paragraph four (4) of the section quoted, provides that if the corporation fails to file said report the duty falls upon either the president or treasurer to file it, if written request to do so is made upon either of such officers, by a stockholder, and if

he or they neglect or refuse to file said report, he or they shall be liable in the penal sum of \$50.00 per day to such aggrieved stockholder for every day they delay. It is contended by the appellant that this paragraph makes either the president or treasurer severally liable if written request is made upon either of them and he neglects, fails or refuses to perform, after such corporation has failed to do so. It is further contended that written request on one is sufficient to make that officer liable for the statutory penalty as the duty which devolves upon him is a several duty and not a joint duty.

Appellant contends that since the duty which devolves upon either the president or treasurer by virtue of paragraph four (4) is several and that the liability is several that if written request is made upon one of the officers, he can make and verify the report and file the same as required by statute, and that upon so doing he has discharged his duty; that even though the report be made and verified only by the officer on whom the demand is made, it is a sufficient report and that no liability would accrue against him; if this be true, it necessarily follows that if the demand is made on both officers they both must make and verify the report and if only one does, the defaulting party would become liable for the statutory penalty, for his neglect or refusal.

Paragraph four (4) of the statute does not say

that demand shall be made upon both the president and treasurer. The penalty of the statute is placed upon either of such officers for the failure of either of such officers to file the report after written request to do so has been made by a stockholder.

In paragraph three (3) of the statute it is provided that the contracts of the CORPORATION with residents of Alaska, shall be voidable as against the corporation, as long as it neglects or fails to file said report. This paragraph makes the contracts of the corporation voidable and not the contracts of the President or Treasurer voidable. It is submitted that this paragraph clearly shows that the intent of the legislature was to place the duty in the first instance on the corporation to file an annual report, which report was to be made and verified by the president and treasurer. If the legislature had intended the duty to have been placed upon the president and treasurer then the legislature would have made the contracts of the president and treasurer voidable or placed upon them some other burden.

SECOND POINT

If the duty to file the report is on the corporation in the first instance, then upon the corporation's failure to file it, does the duty to do so, devolve upon the president and treasurer jointly, severally, or jointly and severally, after written request is made upon either of them by a stockholder?

In paragraph four (4) of the section quoted, it is provided that if any report be not made and filed as required by the statute, either of such officers who shall thereafter refuse or neglect to make and file such report within ten (10) days after written request to do so shall have been made by a stockholder shall be under a penalty of \$50.00 recoverable by such aggrieved stockholder for every day he or they shall so neglect or refuse.

It is to be noted that this paragraph says that either of such officers shall be liable after written request has been made by a stockholder to file the report.

The appellant contends that if demand is made on one of the officers, that such officer is the only one liable, as the duty which devolves upon either of such officers by virtue of paragraph four (4) is a several duty and not a joint duty.

If demand is made upon both officers and one of them neglects and the other complies with the request, it is obvious that the one who neglects is liable and the one who complies is not liable for the statutory penalty.

If the duty is on the corporation in the first instance, as we contend, then no duty was upon the president and treasurer until the corporation has failed to perform its duty and after written request was made upon either or both of them. When the demand was

made upon the defendant, Wallis George, though no demand was made upon the president, it became the duty of the defendant and he could have fulfilled that duty by making and verifying a report and filing said report as required by statute. It is obvious that the treasurer could not have made the president verify the report whether demand had been made upon the president or not, but that the treasurer could have fulfilled his duty by making and verifying the report and filing same.

THIRD POINT

Is it necessary for an aggrieved stockholder to make a written request on both the president and treasurer, or is a demand upon one of them sufficient to subject him to the statutory penalty if he fails or refuses to make and file the report within the period prescribed by the statute.

Appellant contends that the liability imposed upon either of such officers who neglects to perform such duty, is a several or joint and several liability and that it is not necessary to make the written request upon both officers, in order to subject the one to the penalty upon whom request was made. The duty is several or joint and several and the liability accordingly.

The statute does not state that both of such officers must be requested to make and file the report, but on the contrary, states that if either of them fails to per-

form after written request shall be liable. It follows that written request upon either of them is sufficient to subject him to the penalty imposed by the statute for his failure to comply.

CONCLUSION

Paragraph one (1) of the statute in question states that the duty is on the corporation to file a report, made and verified by the president and treasurer, within a certain period of time. If the corporation filed a report which was not made and verified by the president and treasurer, it would be the same as no report at all.

Paragraph two (2) of the statute provides that the corporation shall be penalized if it does not perform such duty as stated in the first paragraph, to-wit, that the contracts of the corporation with the residents of Alaska shall be voidable, as to the corporation, until such corporation performs such duty.

Paragraph four (4) of the statute provides that the duty shall devolve to the president and treasurer if written request is made upon either of such officers by a stockholder and if he or they neglect or refuse he or they shall be liable for the penalty as provided by the statute.

Paragraph four (4) places this duty on the officer for the first time, after the corporation fails to perform

such duty. There was no duty upon them either severally or jointly and severally before the written request was made by the stockholder. After the request was made upon either of such officers then the duty was placed upon him for the first time. He could perform this duty without the aid or assistance of the other officer.

The duty and liability upon the president and treasurer, as provided by paragraph four (4) is several or joint and several, and it is not necessary to make a written request upon both in order to make the one upon whom written request was made liable, for the penalty provided by the statute.

We think, therefore, that the trial court erred in sustaining defendant's demurrer to plaintiff's amended complaint on the ground that the facts alleged are insufficient to constitute a cause of action against defendant for failure to file the annual report of the corporation of which he is secretary and treasurer, after having been requested, in writing, to do so, by plaintiff stockholder.

Respectfully submitted,

HAROLD H. BATES,

Attorney for Appellant.

